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No. 01-647

In The Supreme Court of the United States

CHRISTOPHER T. LIZZI,

Petitioner,

v.

WMATA, ROBERT ALEXANDER, CHARLES THOMAS, PHILLIP WALLACE, AL McCOY, ANTHONY JOHNSON DENISE KURTZ (as personal representative of the estate of Michael Kurtz), and JACK BYRD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Compact Clause of Article I, Section 10

> No State shall, without the Consent of Congress, enter into any Agreement or Compact with another State....

United States Constitution, Amendment XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, Sections 1 and 5

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; no deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

WMATA Compact, Section 12(a)
Md. Cts. & Jud. Proc. Code Ann. § 10-204(12(a))

In addition to the powers and duties elsewhere described in this title, and except as limited in this title, the Authority may:
(a) sue and be sued....

WMATA Compact, Section 80
Md. Cts. & Jud. Proc. Code Ann. § 10-204(80)

The Authority shall be liable for its contracts and for its torts and those of its directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the zone of any immunity from suit.

WMATA Compact, Section 81
Md. Cts. & Jud. Proc. Code Ann. § 10-204(81)

The United States District Courts shall have original jurisdiction, concurrent with the courts of Maryland, Virginia and the District of Columbia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State or District of Columbia court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

REASONS FOR GRANTING THE WRIT

I. By Holding That The WMATA Interstate Compact, Which Says That WMATA May "Sue And Be Sued" And That United States District Courts Shall Have Jurisdiction Over Suits Against WMATA, Does Not Waive Eleventh Amendment Immunity, The Fourth Circuit Contradicted This Court's Holdings, In Port Authority Trans-Hudson Corp. v. Feeney And Petty v. Tennessee-Missouri Bridge Comm., That Such Consent-To-Suit And Federal-Court-Venue Provisions Waive The Eleventh Amendment Immunity Of Interstate-Compact Entities.

Would Congress have approved the WMATA Compact if it had known that WMATA would – in the face of Compact provisions stating that federal courts have jurisdiction over suits against WMATA - assert that it can't be sued in federal court for violating federal law?

Never - especially given that in 1959, several years prior to Congressional approval of the Compact, this Court held, in Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959), that provisions analogous to §§ 12(a) and 81 of the Compact are a waiver of Eleventh Amendment immunity.

And contrary to WMATA's suggestion, Hess v. Port-Authority Trans-Hudson Corp., 513 U.S. 30 (1994), did not even address – much less resolve – whether provisions like §§ 12 and 81 effect such a waiver. Rather, Hess addressed the situations in which a suit against an interstate entity

should be considered, for Eleventh Amendment purposes, a suit against the States creating it. Indeed, the Hess Court expressly noted that it was addressing only this latter issue, in contrast to its earlier decision in Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990), which addressed whether PATH – the same interstate entity that was at issue in Hess - had effectively waived Eleventh Amendment immunity. See Hess, 513 U.S. at 38-39.

Likewise, the portion of Morris v. WMATA, 781 F.2d 218 (D.C. Cir. 1986), cited in Hess addressed only whether a suit against WMATA is effectively a suit against the States creating it. Morris, 781 F.2d at 225-27.

It's true that a footnote in Morris touched on the waiver issue. 781 F.2d at 222 n. 3. But that footnote reveals both that the plaintiff there wasn't even asserting waiver and that the Morris court didn't consider Petty, which guided this Court's discussion of waiver in Feeney.

Its distracting references to Hess and Morris aside, WMATA nowhere challenges petitioner's argument that § 80 of the WMATA Compact - which refers merely to claims arising under the laws of the signatories to the Compact – applies only to state-law claims, and conversely musters no defense of the Fourth Circuit's conclusion that § 80 delineates the full scope of WMATA's consent to be sued.

WMATA also makes no effort either to square the Fourth Circuit's holding with this Court's holdings in Feeney and Petty or to reconcile the holding below with Justice Scalia's observation in College Savings Bk. v. Florida Prepaid Postsecondary Educ. Exp. Bd., 527 U.S. 666 (1999), that cases – such as Petty - involving interstate-compact

agencies present an immunity analysis that is "fundamentally different" than that applicable to purely-state agencies. Id. at 686-87.

Review of this case is important for purposes of not only correcting the Fourth Circuit's departure from Feeney and Petty, but also clarifying the principles relating to waiver of Eleventh Amendment immunity. In this regard, this Court is currently considering several cases involving waiver issues – albeit waiver issues that differ in varying degrees from that presented here. (Those cases include Mathias v. WorldCom Tech, Inc. (No. 00-878), in which the Solicitor General's Brief relies on Petty.) Consideration of this case along with those cases will enable this Court to efficiently – and more comprehensively - clarify the waiver spectrum.

II. The Fourth Circuit's Holding That The FMLA Doesn't Abrogate Eleventh Amendment Immunity Conflicts With This Court's Federalism Decisions.

On December 11, 2001, the Ninth Circuit, in Hibbs v. HDM Dept. of Human Resources, 2001 U.S. App. LEXIS 26364 (9th Cir. 2001), held that the FMLA abrogates Eleventh Amendment immunity insofar as it provides for family leave.

The Ninth Circuit's decision conflicts directly with the Fourth Circuit's holding below. The Fourth Circuit – without distinguishing between the FMLA's personal-leave and family-leave provisions - held that the FMLA does not abrogate Eleventh Amendment immunity. It employed a line of reasoning which nullified the FMLA in its entirety as to the States. For instance, the Fourth Circuit stated that while

an ostensible purpose of the FMLA is to minimize gender discrimination by providing for medical leave and family leave, Congress failed to identify any pattern of state-sponsored discrimination relative to providing "family or medical care." App. (to Petition for Certiorari) 13a. Further targeting the FMLA's personal and family-leave provisions together, the Fourth Circuit asserted that "instead of attempting to remedy the identified [Constitutional] violation, Congress attempted to redefine the right," and that "[t]he Fourteenth Amendment does not allow Congress to prescribe a privately enforceable guarantee to all state employees of at least twelve weeks of leave per year." App. 13a-14a. Finally, it concluded, without qualification, that "[t]he FMLA does not validly abrogate a state's Eleventh Amendment immunity from suit." App. 14a.

While the Hibbs Court stated in dicta that the FMLA's family-leave provision "can more plausibly [than the person-leave provision] be defended as an attempt to remedy gender discrimination," 2001 U.S. App. LEXIS 26364, at *8 n.3, that assertion is suspect for several reasons. First, as explained by Judge Dennis of the Fifth Circuit, any abrogation analysis that examines that FMLA's personal and family-leave provisions separately ignores the fact that Congress intended them to work interdependently to combat gender discrimination and is analogous to "the proverbial blind men examining an elephant's parts." Kazmier, 225 F.3d at 544 (Dennis, J., dissenting).

Second, as demonstrated by Judge Cook in his dissent in Garrett v. University of Alabama, 193 F.3d 1214 (11th Cir. 1999), rev'd on other grounds, 121 S.Ct. 968 (2001), the personal-leave provision is indeed an integral part of the weaponry which Congress installed in the FMLA

to combat gender discrimination. 193 F.3d at 1228-31. With particular reference to the personal-leave provision, Judge Cook stated that "by authorizing leave for all serious health conditions rather than only for pregnancy related disabilities, the FMLA discourages discrimination against women of childbearing age." Id. at 1230-31. In support, he cited a 1991 Senate Report which states as follows regarding the bill containing the FMLA: "Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women by legislation which provides job protection only for pregnancy related disability." 193 F.3d at 1231 n. 16 (quoting S. Rep. No. 102-68, at 35 (1991).

Resisting review, WMATA simply insists that the circuits to date have uniformly held that the FMLA doesn't abrogate Eleventh Amendment immunity. Hibbs introduces conflict on that issue, however. Moreover, the circuits to which WMATA refers have based their conclusion on this Court's holdings in cases such as Garrett and Kimel. In so doing, they have wrongly – and seemingly reflexively – treated the FMLA as just another domino ready to fall alongside the statutes involved in those cases. Petition for Certiorari at 13-19.

Given that there is a substantial question as to whether the FMLA abrogates Eleventh Amendment immunity, and that inter-circuit conflict exists on this issue, this Court should grant review.

III. The Fourth Circuit's Holding That The Eleventh Amendment Shields State Officers From FMLA Liability Not Only Conflicts

With A Tenth Circuit Holding That Imposes Individual-Capacity Liability On Government Officials For FMLA Violations And The Holdings Of Various Circuits That The Eleventh Amendment Does Not Immunize State Officers From Individual-Capacity Liability, But Also Contradicts This Court's Holding In Hafer v. Melo.

Two months ago, Judge Gibson of the Eighth Circuit expressly noted the conflict between the holdings of the Fourth Circuit in this case and the Tenth Circuit in Cornforth v. University of Okla. Bd. of Regents, 263 F.3d 1129 (10th Cir. 2001). See United States ex rel. Gaudineer & Cornito, L.L.P. v. Iowa Dept. of Human Serv., 269 F.3d 932, __, 2001 U.S. App. LEXIS 26839, at *19-20 (8th Cir. 2001)(Gibson, J., dissenting). Judge Gibson's observation supports petitioner's position that Cornforth most certainly rejects the Fourth Circuit's reasoning here, as well as the reasoning of the Fifth and Eleventh Circuits in Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000), and Wascura v. Carver, 169 F.3d 683 (11th Cir. 1999), respectively.

In opposing review, WMATA cites various decisions which address official-capacity claims against state officers. WMATA Opposition at 9-11. But those cases are obviously irrelevant to the individual-capacity issue presented here.

WMATA also states that this Court should abstain because only the Fourth, Fifth, Tenth, and Eleventh Circuits have addressed the issue presented. WMATA Opposition at 11. Yet this Court need not – and should not – condition its review on further circuit disarray, especially when the

decisions on one side of the conflict stray far from this Court's precedent.

Finally, WMATA says that the issue presented here may become moot, because no circuit has determined whether the FMLA's language imposes liability on individuals. Aside from disregarding the status of this case, this statement ignores reality. As recently noted in Morrow v. Putnam, 142 F. Supp.2d 1271, 2001 U.S. Dist. LEXIS 15280, at *10 (D. Nev. 2001), "[m]ost circuit courts have held that the FLSA extends liability to supervisory personnel" and "[t]he majority of courts have applied this precedent from the FLSA to find that supervisors may be sued in their individual capacity under the FMLA." Further, the Fourth Circuit's reasoning, if correct, applies outside the FMLA context. In fact, the Fourth Circuit recently described its holding below as "our holding in Lizzi that if a statute treats an individual state employee as the employer, the real party in interest is in reality the state itself" and simultaneously stated that the Seventh Circuit – in an FLSA case – has agreed with this holding. Montgomery v. Maryland, 266 F.3d 334, 340 (4th Cir. 2001). The Fourth Circuit has thus clarified that its holding applies not only to the FMLA, but also to the FLSA and all other statutes that treat an individual state employee as an employer. And based on the Fourth Circuit's view, a district court has held that state officers cannot be held personally liable for FLSA violations. Baird v. Kessler, 2001 U.S. Dist. LEXIS 19106, at *20 (E.D. Cal. 2001). Also, prior to this case, the Ninth Circuit similarly held that the Eleventh Amendment bars FLSA claims against state officers in their individual capacity. Hale v. Arizona, 993 F.3d 1387, 1399 (9th Cir. 1993).

In summary, the principle that state officers can be held liable in their individual capacity is an important component of the coherent federalism jurisprudence which this Court has delineated in recent years. The Fourth Circuit's holding conflicts with that principle and creates inter-circuit conflict concerning it. Unless the conflict is resolved, this Court's efforts to clarify and maintain the federalism envisioned by the Framers will remain unfinished, and federalism jurisprudence will remain unnecessarily confusing.

IV. In Hafer v. Melo, This Court Recognized, But Did Not Resolve, An Inter-Circuit Conflict Concerning The Proper Method For Determining, In Instances Where The Complaint Does Not Specify, Whether State Officers Have Been Sued In Their Individual Or Official Capacity. The Fourth Circuit, By Reviewing Only The Complaint - Rather Than The "Course Of Proceedings" - To Determine Whether Government Officials Were Sued In Their Individual Or Official Capacity, Adopted An Approach That, While Consistent With The Method Employed By The Sixth And Eighth Circuits, Conflicts With The "Course-Of-Proceedings" Approach Used By Not Only The Second, Third, Fifth, Seventh, Ninth, Tenth, Eleventh, And District of Columbia Circuits, But Also The Fourth Circuit Itself In Prior Cases.

On November 8, 2001, the Sixth Circuit, sitting en banc in Moore v. City of Harriman, 272 F.3d 769, 2001 U.S.

App. LEXIS 24056, (6th Cir. 2001), again exposed the inter-circuit conflict on this issue. The Moore dissent expressly noted that this Court has recognized, but not resolved, this conflict. 2001 U.S. App. LEXIS 24056, at *21 n. 4.

Moreover, the majority and minority opinions in Moore exemplify the conflict. The majority recognized that other courts have interpreted Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989), to require plaintiffs to plead "individual capacity" in the complaint, but held that the Sixth Circuit actually has applied a "course-of-proceedings" test to determine the capacity in which state officers have been sued. 2001 U.S. App. LEXIS 24056 at *6-7. But the Moore dissent vehemently argued, first, that, in Wells, the Sixth Circuit adopted the contrary approach adopted by the Eighth Circuit in Nix v. Norman, 879 F.2d 429 (8th Cir. 1989), and, second, that this latter – and more stringent – approach "gives effect to important jurisdictional and jurisprudential concerns." 2001 U.S. App. LEXIS 24056 at *67.

Moore confirms the need for this Court's resolution of this issue. The substantive issues presented by actions against state officers are difficult enough. There is no need for this procedural morass – which can be resolved with relatively straightforward guidance from this Court - to complicate matters further.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. Alternatively, this Court should summarily reverse the holdings of the Fourth Circuit addressed herein.

Respectfully Submitted,
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